Supreme Court, U.S
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**IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1991**

No. 91-861

Mike Todd,

Petitioner

vs.

Carey Smith, Individually and in his official capacity as former City Manager of the City of Myrtle Beach, South Carolina; Mack Stone, Individually and in his official capacity as former Director of the Myrtle Beach Convention Center; and the City of Myrtle Beach, South Carolina, a municipal corporation,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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PETITIONER'S QUESTION PRESENTED

Was an official policy of the City of Myrtle Beach established when the city administrator and convention center director closed down the petitioner's art exhibit, with the full knowledge and acquiescence of each of the city's council members, without following required due process procedures governing claims of obscenity, which would create liability under 42 U.S.C. §1983 (1988) as a violation the petitioner's rights secured by the First and Fourteenth Amendments to the United States Constitution?

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Respondents pray that Petitioner Mike Todd's Petition for Writ of Certiorari to review the judgment of the Supreme Court

of South Carolina be denied.

JURISDICTION

Under 28 U.S.C.A. §1257(a) (West Supp. 1991), the Supreme Court may review final judgments from the highest court of the state where rights and privileges are claimed under the U.S. Constitution or federal statutes. In the present case, Petitioner is claiming that his constitutional rights were violated by Respondents and that he is entitled to compensatory damages for those violations pursuant to 42 U.S.C.A. §1983 (West Supp. 1991). The South Carolina State Supreme Court filed an order on August 5, 1991 affirming a lower court's order rejecting Petitioner's claims for compensation. Petitioner's request for a rehearing was denied September 4, 1991.

STATEMENT OF THE CASE

Petitioner's claim against Respondents arises under 42 U.S.C. §1983 and alleges a violation of Petitioner's civil rights secured by the First and Fourteenth Amendments of the United States Constitution. The individual Respondents successfully obtained a summary judgment denying Petitioner's claims on the grounds that Carey Smith and Mack Stone enjoy qualified immunity from suit by reason of Harlow v. Fitzgerald, 457 US 800 (1982). Petitioner has not challenged that decision in his Petition.

Respondent City of Myrtle Beach was granted summary judgment on the ground that under the showing made by Petitioner no custom or policy existed which caused Petitioner to be deprived of his constitutional rights. Todd v. Smith,

407 SE2d 644 (SC 1991). Petitioner is seeking a Writ of Certiori to review that part of the South Carolina Supreme Court's decision.

STATEMENT OF FACTS

On November 7, 1982, Petitioner displayed an exhibition of his art work in the inner lobby of the Myrtle Beach Convention Center. The exhibition consisted of 31 paintings and 6 sculptures. Petitioner was allowed to exhibit in the inner lobby of the Myrtle Beach Convention Center because he was a member of the Waccamaw Arts and Crafts Guild. The Waccamaw Arts and Crafts Guild, through a series of agreements, was permitted to show art exhibits in the inner lobby of the Myrtle Beach Convention Center. The inner lobby of the Myrtle Beach Convention Center is a wide hall

through which all persons attending functions at the Myrtle Beach Convention Center must pass.

On the evening of November 7, 1982, the President of the Waccamaw Arts and Crafts Guild approached the Petitioner with a request that he remove one of the paintings from his exhibit no later than November 8, 1982. The painting was entitled "Narcissus or Twentieth Century Mondonna."

Petitioner refused to remove the painting from the exhibit. Thereafter, members of the Waccamaw Arts and Crafts Guild called the attention of Respondent Carey Smith, City Manager for Myrtle Beach, and Respondent Mack Stone, Director of the Myrtle Beach Convention Center, to the painting. Both Respondent Stone and Smith decided the painting was offensive

and inappropriate for the inner lobby of the Myrtle Beach Convention Center due to the fact that the general public, including children of all ages, would be passing through the inner lobby to attend events in the main auditorium.

Respondent Stone began negotiating with the Petitioner to find an alternative to exhibiting the painting in the inner lobby of the Myrtle Beach Convention Center. The press became involved and various members of the City Council were informed of matters as they developed.

Respondents do not agree with Petitioner's statement that the exhibit was closed with the full knowledge and acquiescence of each of the City's council members. Respondents agree with the Opinion of the South Carolina Supreme Court which stated the most that can be

said is that some discussion was held informally and individually with some members of the City's council.

At approximately 5:30 on the evening of November 9, 1982, Respondent Stone and Petitioner reached an impasse in negotiations when Petitioner refused to relocate the painting unless a letter was signed by an official from the City of Myrtle Beach stating that no further actions would be taken with regard to the remaining paintings in the exhibit. Respondent Stone contacted Respondent Smith and a decision was made during their phone conversation to close Petitioner's exhibit.[1] Petitioner's exhibit was

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[1] "It ended up, 5:30 or six o'clock that afternoon or somewhere in that neighborhood, that Mike [Petitioner Mike Todd] decided, with whoever was giving him information -- he kept wanting to make phone or

curtained off from the view of the public due to the fact that the Miss Myrtle Beach Beauty Pageant was scheduled to take place that same evening at 7:00 p.m. No further negotiations occurred after the decision was made to close the Petitioner's exhibit.

On November 11, 1982, Petitioner filed an action in the circuit court

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> wanted to go check with somebody, et., etc.; it ended up where he came at 5:30 or six o'clock and said, 'I am not taking the portrait down; I'm not doing anything with it.' So, I informed Carey Smith of his decision, and at that point in time, Carey said, 'Well, then, we need to close the show' which we did, at or about six o'clock, and in fact, there were people coming into the facility at that point in time, early arrivals for the seven o'clock opening of the beauty pageant."
> RESPONDENT STONE'S TESTIMONY, TR. P. 42-43

alleging that the Respondents had censored his exhibition without due process of law. On November 22, 1982, the court issued a temporary restraining order to preserve the status quo. Todd v. Smith, 407 SE2d 644, 646. The effect of the restraining order was that the exhibit of Petitioner was to be reopened without further interference from members of the Waccamaw Arts and Crafts Guild or the Respondents.

Petitioner was permitted by Respondent Stone to reopen his exhibition pursuant to the Judge's order. Thereafter, Petitioner voluntarily removed his exhibit because the inner lobby was to be used as a display area for a previously scheduled event.

An incident involving the closing of an art exhibit on city-owned property had

never occurred before in the history of the City of Myrtle Beach. Todd v. Smith, 407 SE2d at 647.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. THE DECISION BY THE SOUTH CAROLINA SUPREME COURT WAS BASED UPON THE PETITIONER'S FAILURE TO MAKE A SHOWING THAT THE RESPONDENT CITY OF MYRTLE BEACH WAS RESPONSIBLE FOR A POLICY OR CUSTOM WHICH DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND DOES NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT.

In order to maintain a cause of action under §1983 against a municipality, the Plaintiff must show (1) an official policy or custom existed, (2) that caused the Plaintiff to be subjected to, (3) a denial of a constitutional right. Monell v. The Department of Social Services, 436

U.S. 658, 690 (1978). The cases following Monell, supra., show that municipal liability is limited to actions for which the municipality is actually responsible. Pembaur v. City of Cincinnati, 475 US 469, 470 (1986).

Respondent City of Myrtle Beach nas adopted a form of government in which all legislative powers of the municipality and the determination of all matters of policy are vested in the municipal council. S.C. Code Ann., §5-13-30 (Law. Co-op., 1976). Under the form of government adopted by the Respondent City of Myrtle Beach, the sole authority for setting City policy is vested with the municipal council. The City Manager and the Director of the Myrtle Beach Convention Center have been given discretion to carry out those policies, but they do not have any

authority to create policy. S.C. Code Ann. §5-13-30 (Law. Co-op., 1976), Todd v. Smith, 407 SE2d at 646.

In the present case, the municipal council never met on the subject of Appellant's art exhibit, nor did they vote on the decisions of Respondent Smith or Respondent Stone. As Acting Associate Justice Littlejohn indicated in the South Carolina Supreme Court Opinion the most that can be said favorably to Petitioner's contention that the City of Myrtle Beach established a policy is that some discussion was held informally and individually with some members of council. Todd v. Smith, 407 SE2d at 647.

Petitioner argues that an official policy may be established by the omissions of the municipal council as well as from their affirmative acts. Avery v. County

of Burke, 660 F2d, 111 (4th Cir. 1981). However, in order for omissions to be actionable, the failure to act must rise to the level of deliberate indifference. Estelle v. Gamble, 429 US 97, 97 S.Ct. 285 (1976). A single incident is normally insufficient to establish liability under 42 U.S.C. §1983 and such issues are generally considered matters of fact not of law. Turpin v. Mailet, 619 F2d 196 (1980).

Under the facts of this case, this was a single incident and it was the only time that such a situation had ever arisen in the history of the City of Myrtle Beach. A decision was made at the point in time when negotiations broke down between Petitioner and Respondent Stone. The decision was made during a phone conversation between Respondent Stone and

Respondent Smith. Such a decision under those circumstances is not sufficient to make a showing that the members of the council were deliberately indifferent to Petitioner's constitutional rights. Estelle v. Gamble, 429 US 97, 97 S.Ct. 285 (1976).

Petitioner argues that it was the duty of the council members to call a meeting and repudiate the actions of either the City Manager or the Director of the Convention Center at the time they became aware of a questionable use of discretion on the parts of Smith and Stone. Respondents note that all of the Justices of the South Carolina State Supreme Court concurred that the individual Respondents Smith and Stone were shielded by qualified immunity because their actions did not violate

clearly established constitutional rights.

Petitioner has not sought a review of that portion of the South Carolina Supreme Court's finding in his Petition for a Writ of Certiori. How can the City of Myrtle Beach's policy makers be said to be exhibiting deliberate indifference to Petitioner's rights when it was not clear that his constitutional rights were violated? Further, Respondents do not concede Petitioner's rights were violated. See Close v. Lederle, 424 F2d 988 (1st Cir. 1970) (Cert. Den. 400 US 903) and Piarowski v. Ill. Community College, 759 F2d 625 (7th Cir. 1985) (Cert. Den. 474 US 1007).

In addition to the fact that Petitioner's constitutional rights were not clearly established, Petitioner filed for judicial review of Respondent Smith's

decision two days after it was made. Respondents contend that Petitioner did not request a policy decision from Respondent City of Myrtle Beach nor did he make a showing that he asked to be heard by the municipal council at their next scheduled meeting.

Neither can it be said that the acts of Respondents Stone and Smith represented a "custom" of Respondent City of Myrtle Beach. "Custom" has been defined by this court as "persistent and wide-spread discriminatory practices of officials." Adickes v. S. H. Kress and Co., 398 U.S. 144, 167 (1970). This court in Adickes, supra. at 167, further held that a custom or usage of a governmental body for purposes of §1983 must have the force of law by virtue of the persistent practices of the officials.

In the present case, the acts of Respondents Stone and Smith were individual discretionary acts, involving a decision on how to handle a situation which had arisen after negotiations reached an impasse between Petitioner and Respondent Stone. Todd v. Smith, 407 SE2d at 645. The situation may have been different had Respondents Smith and Stone, on a regular basis, made decisions on closing art exhibits.

2. THE SOUTH CAROLINA SUPREME COURT'S DECISION DOES NOT RAISE A RECURRING PROBLEM CONCERNING WHAT IS NECESSARY TO ESTABLISH A GOVERNMENT POLICY OR CUSTOM BECAUSE THE DECISION IS BASED UPON THE FACTUAL SHOWING MADE BY PETITIONER IN RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT.

The decision of the South Carolina Supreme Court turns upon the particular fact situation involved. The South Carolina Supreme Court has not made new

law or established new parameters with regard to what constitutes a custom or policy of a municipal government. The finding of the South Carolina Supreme Court is that under the showing made by the Petitioner in this case, Petitioner did not show that Respondent City of Myrtle Beach had a policy or custom which caused Petitioner to be deprived of a constitutional right. The issue of authorization, approval, or encouragement amounting to a custom or policy is generally a matter of fact and not law. Turpin v. Mailet, 619 F2d 196 (2nd Cir. 1980).

The South Carolina Supreme Court Opinion merely states under the showing made by Petitioner, the Court refuses to hold that it was the duty of council members to call a meeting to repudiate the

actions of either the City Manager or the Director of the Convention Center. They found that no policy was promulgated. Todd v. Smith, 407 SE2d at 647.

If Petitioner's constitutional rights were violated, the violations occurred as a result of the exercise of discretion of Respondents Stone and Smith in handling a situation which had never occurred before in the City of Myrtle Beach. The precedent for the present case should be limited to its facts and the findings of the Trial Court and the South Carolina Supreme Court.

CONCLUSION

For these reasons, Respondents contend that the Writ of Certiorari should be denied.

Respectfully submitted,

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